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ABSTRACT

At the May 1995 Membership Meeting of the Association of Research Libraries (ARL), a panel of experts offered four perspectives on strategies and public policy choices involved in defining the rights and responsibilities of copyright owners, users, and the libraries in the networked environment. These perspectives, and an additional paper originally delivered to the Association of American Publishers, are published together to stimulate and inform discussions within the scholarly community. Titles are: "Copyright, Public Policy, and Digital Libraries: Searching for First Principles" (Jerry D. Campbell); "Fair Use in an Electronic Age: A View from Scholars and Scholarly Societies" (Douglas C. Bennett); "Copyright, Libraries, and the Financial Viability of Scholarly Society Journals" (Catherine E. Rudder); "Coping with Copyright and Beyond: New Challenges as the Library Goes Digital" (Karen Hersey); and "Copyright Challenges for Libraries and Higher Education: The NII and the Texaco Decisions" (Kenneth D. Crews). Appendices contain: "American Geophysical Union, et al. v. Texaco Inc." (Sarah K. Wiant); "Intellectual Property: An Association of Research Libraries Statement of Principles"; and "Fair Use in the Electronic Age: Serving the Public Interest." (MAS)

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Copyright, Public Policy, and the Scholarly Community

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ARL Mission Statement

The mission of the Association of Research Libraries is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to, and effective use of recorded knowledge in support of teaching, research, scholarship and community service. The Association articulates the concerns of research libraries and their institutions, forges coalitions, influences information policy development, and supports innovation and improvement in research library operations. A not-for-profit membership organization comprising the libraries of North American research institutions, ARL operates as a forum for the exchange of ideas and as an agent for collective action.

Foreword

This past year saw the emergence of a national discussion of copyright and intellectual property, especially with regard to copyright in the electronic environment.

Propelled by the Clinton Administration as part of its National Information Infrastructure (NII) priority, discussions led by the Administration's Working Group on Intellectual Property Rights have explored the application and effectiveness of copyright law. Headed by Bruce Lehman, Commissioner of Patents and Trademarks, the Working Group issued a draft report, *Intellectual Property and the National Information Infrastructure* (July 1994), known as the Green Paper.

The Green Paper asserts that "the potential of the NII will not be realized if the content (of the NII) is not protected effectively." To that end, the draft report proposes a series of recommendations for amending the Copyright Act of 1976 to "provide the necessary protection of rights in copyrighted works." Changes proposed to the copyright law relate to fair use, distribution by transmission, first sale, and educational uses.[1]

Although the Working Group initially characterized these amendments as only "minor changes" to the 1976 Act, if implemented, they would dismantle the current balance between the rights of copyright owners and the rights of libraries and users of proprietary information. The Association of Research Libraries (ARL), with others in the library and higher education community, presses for the continued equitable balance between those rights. The full potential of the NII for the education and research communities will not be

[1] The Green Paper has received many comments since its release. A final White Paper is expected to be issued in 1995.

realized if the current balance in the print environment is not extended to the electronic environment.

A recent step toward seeking consensus around matters of intellectual property in an electronic environment was ARL membership endorsement of a statement, *Intellectual Property: An Association of Research Libraries Statement of Principles, Affirming the Rights and Responsibilities of the Research Library Community in the Area of Copyright* (See Appendix 2). The statement was made available to a large number of educational associations to inform and to invite discussion of the issue. This discussion led to the endorsement of the statement by the American Library Association (ALA), American Association of Law Libraries (AALL), CAUSE, and the National Humanities Alliance. It also sparked the development of companion statements in other organizations.

The 1994 release of the Green Paper and related calls for copyright legislative reform, led to collaboration among five library associations to address copyright and technology. In January 1995, this partnership produced a working document, *Fair Use in the Electronic Age: Serving the Public Interest*, that ventures a definition of lawful uses of copyrighted works in the NII (See Appendix 3). The ARL Board endorsed the statement and encouraged that it be made widely available to spark discussions about fair use of copyrighted materials in an electronic age.

Simultaneously, as a direct follow-up to the Association of American Universities (AAU) Research Libraries Project, an AAU-ARL Task Force on Intellectual Property was established, led by Peter Nathan, Provost, University of Iowa. This joint task force has the support of ARL's Office of Scientific and Academic Publishing (OSAP) to undertake tasks that encourage and assist university campus reviews of intellectual property

practices and policies, possibly resulting in a model statement or two that could be adapted for local use.

Copyright and fair use of copyrighted material are defining issues for the successful transition of research collections to the electronic environment.

At the May 1995 Membership Meeting of ARL, a panel of experts offered four perspectives on the strategies and public policy choices involved in defining the rights and responsibilities of copyright owners, users, and libraries in the networked environment. These perspectives and an additional paper by Douglas Bennett (ACLS), originally delivered to the Association of American Publishers, are published together to stimulate and inform discussions within the scholarly community.

Betty G. Bengtson
Director of University Libraries
University of Washington
July 1995

"... all human beings have a right to knowledge; that knowledge, like freedom, is not a commodity to be bought and sold ... what we refer to as scholarly knowledge should be placed in the public domain at its origin; made as easily and freely available to all as we can make it."

Copyright, Public Policy, and Digital Libraries: Searching for First Principles

It is not surprising that most of our energy is directed toward getting necessary things done. Neither is it surprising that our agendas are, for the most part, set for us by the natural flow of business. I do not mean to suggest that we have no control over the nature of our work or that we do not occasionally exercise such control. Yet, I do believe that from day to day we spend most of our time engaging ongoing issues that have originated elsewhere and that often pertain to larger matters. This circumstance, I believe, prompts us most often to adopt responsive and practical courses of action -- a "taking care of business" approach. Neither do I intend to call this approach into question by making these observations. Taking care of business is a good thing. A responsive and practical approach is necessary if we are to keep complex organizations up to date and viable.

I do intend to suggest, however, that there are exceptional occasions when our typical, responsive approach is inadequate.

From time to time, we encounter issues of such fundamental significance that they deserve our full intellectual attention and something more than a normal, practical response. And I wish to argue that, in the emerging digital information environment, copyright is such an issue.

While necessary in the meantime, our practical responses to copyright have suffered two inescapable defects. On the one hand, they have been largely defensive. I think it would be fair to say that we and the larger academic community (excepting EDUCOM and perhaps the Association of American University Presses) would be pleased to see the current situation as reflected in the 1976 copyright law and its fair use provision continue. We were not among those initially arguing that the law should be reviewed for the purpose of better adapting it to the digital environment. Even though prompted by others, such a review demanded our attention once it was initiated. Since copyright defines many of the legal boundaries that govern the actions of libraries, involvement in the debate became at once a matter of defending and preserving certain practices that the library community had come to depend upon. We were automatically cast in a defensive mode.

On the other hand, our responses have been characterized by self-interest. By definition, most defensive actions represent self-interest. The potential revisions in the copyright law have been in the debate phase, and this debate will continue until the matter is settled by Congress. Debate requires that each participant present its own view of the matter, their self-interest. Publishers argue for a solution that guarantees the best economic advantage to copyright holders; librarians argue for an environment that enables the most flexibility for sharing and using information; technologists lobby for an environment in which the technology itself will flourish regardless of the consequences for commerce or access.

However necessary they may be, I characterize our defensive and self-interested responses as defective because they lack something akin to moral high-ground. They are not undergirded by a larger, nobler purpose that places our copyright discussions in a conceptual framework, that provides them with both meaning and context. In such a circumstance, we are more or less just asking legislators to choose sides, to determine from their own biases whose self-interests to affirm. We are in need, therefore, of a deeper foundation, a first principle, if you will, from which to settle the copyright debate.

I offer that such a first principle is simply this, that all human beings have a right to knowledge; that knowledge, like freedom, is not a commodity to be bought and sold; that what we refer to as scholarly knowledge should be placed in the public domain at its origin; made as easily and freely available to all as we can make it. I acknowledge that the statement of such a principle, a right to knowledge as a basic human right, sounds preposterous. Indeed, in the context of current culture, it sounds both preposterous and impossible. And I have to remind myself how preposterous it must have sounded in the late 18th century for a relatively small group of people to assert that all men had certain unalienable rights that included life, liberty, and the pursuit of happiness. Achieving a full definition of human rights is unfinished. It is a process for the ages where concessions are won slowly and sometimes at great cost — most often at the expense of power and wealth. This, of course, explains why it is the work of centuries.

Public education is a step in the direction of enabling the individual's right to knowledge, but it stops short of achieving the goal. While the problems of public education are many and complex, one key problem is the inability of schools at all levels to afford access to knowledge. At a time in our cultural

evolution when we are aware of the debilitating role of ignorance in human civilizations, it is at best baffling and at worst self destructive that we trade knowledge as a commodity, that we hold knowledge ransom for cash to those who can pay for it, and that we do so in spite of the human suffering, often on a grand scale, that results.

Indeed, the right to knowledge is so fundamental a right that it is prerequisite to other basic rights — like life, liberty, and the pursuit of happiness. The concepts upon which all these basic rights are based depend upon a certain prerequisite knowledge. We might hypothesize that giving knowledge away, making certain that every human being has access to some quintessential database of the learnings of human civilizations, would dramatically enrich and improve the human condition in myriad ways, that it would bring a bounty that far exceeds its cost.

In its origins, copyright was a mechanism to stimulate the production and dissemination of knowledge. It did so by providing an incentive to copyright holders through the granting of a limited monopoly. With the new technologies at hand, however, copyright has actually begun to function as an inhibitor to the production and dissemination of knowledge. With these same technologies, it is possible to establish a new model for the dissemination of scholarly knowledge resting on a different set of economic assumptions and in which publishers are simply paid for their value-added services. Because of the sometimes exaggerated cost of information, it is certainly no longer necessary to provide such a monopolistic incentive.

Copyright, therefore, is a concept whose time is past. It has outlived its usefulness. We now have at our disposal the technology to fulfill the promise of extending the most basic human right, the right to knowledge, to all cultures and individuals. And we have the opportunity and the

responsibility to argue that knowledge should be withdrawn from use as a commercial commodity and that the intellectual tyranny imposed by its buying and selling be ended.

Jerry D. Campbell is the University Librarian at Duke University and ARL President.

"The marketplace and entrepreneurial activity certainly will have central places in the development of a national information infrastructure. But a sole focus on profitable undertakings is unlikely to serve well scholarly communities, higher education, or democracy. This is why the concept of fair use is well worth adapting to the new circumstances."

Fair Use in an Electronic Age: A View from Scholars and Scholarly Societies

The 53 learned societies which belong to the American Council of Learned Societies embrace more than 300,000 scholars, and all of these learned societies publish at least one scholarly journal. Consequently, on issues of intellectual property, ACLS and its member societies are not just "in the middle." We might better be described as "schizophrenic" in the current tension between the claims of publishers and users regarding fair use in the new electronic environments.

Scholarly societies feel powerfully the needs, claims, and rights of authors and publishers. And we feel powerfully the needs, claims, and rights of scholars, teachers, and students. The schizophrenia is made even more intense by the understanding that, at different times, these opposed perspectives can be found in the same people and in the same organizations. In using the metaphor of schizophrenia, however, I also want to convey that we believe in the possibility of "normal mental health." We believe in the

possibility of finding constructive ways to harmonize these perspectives, these needs and claims, in a manner that is reasonably constructive and beneficial for all.

The debate over fair use in networked environments is dominated by two large worries, one on the part of librarians and one on the part of publishers. They are never articulated quite this boldly, but they suffuse the conversation, coloring much of what actually is said. The librarians worry that fair use will disappear altogether. They worry that all uses of copyrighted materials will be on a licensed or pay-per-view basis only. They worry that, ultimately, they will be excluded from preserving and archiving intellectual resources. And thus they worry that no one else will care and that many valuable items will be lost forever.

The publishers, on the other hand, worry that the new electronic technology will open the door to rampant unauthorized copying. They worry that thousands of copies, indistinguishable from the original, will be made instantaneously, with just a few renegade keystrokes. They worry that under the guise of fair use, copyrights will no longer be respected. Thus they worry that copyright holders will not be fairly compensated for their works.

One important setting for these discussions is the ongoing Conference on Fair Use in Library and Educational Settings, which is being sponsored by the Working Group on Intellectual Property Rights of the Clinton Administration's National Information Infrastructure Task Force. The conference is organized as an extended negotiation among established stakeholders, primarily, but not only, among publishers and librarians. The focus is on rights, on crafting guidelines which strike a proper balance between the rights of copyright holders and the rights of users of copyrighted materials. Conference participants are proceeding by extrapolation and analogy. We

are working from the assumption that we can make the approaches of the past work in the future. We are hoping to find in the 1976 Copyright Act, and in the guidelines that were crafted at that time, some approaches that are still applicable in this new technology. This is a prudent approach in times of uncertainty and of rapid technological change. The current stakeholders all intend to be around for quite some time. The future is sufficiently murky that no one feels an interest in abandoning the safe ground of the past. There are also some disadvantages to this approach, however.

Approaching these questions by extrapolation and analogy keeps our heads down; it doesn't encourage us to look very far ahead. The focus on rights also makes this an approach that exacerbates division and divisiveness by accentuating our differences. The risk is that we will not make any progress on finding new, constructive solutions. But one thing we all know about the current system of fair use and intellectual property is that it must undergo dramatic change. We cannot and will not go on as we have.

I would like to shift our attention, at least for the moment, to *goals and purposes* rather than *rights or interests*. I want to focus on the wider purposes we are all trying to serve. I want to focus particularly on three contexts in which I believe there is a community of concern among us all: the nurturing of scholarly or disciplinary communities, the provision of higher education to large numbers of Americans, and support for a broad intellectual climate characterized by exploration, inquiry, and creativity. Appreciating some special features of these contexts may lead us to lift our heads up a little and find more constructive approaches.

Scholarly Communities

Over the past century and more, we have built extraordinarily capable scholarly communities in a wide array of fields and disciplines. These are communities of special expertise and understanding. These scholarly or disciplinary communities have both informally and formally organized aspects. They involve, for example, close relationships of colleagueship and circles of interest in particular specialized topics. But they also involve such formal modes of organization as college and university departments, journals, and the learned societies which belong to ACLS.

There is a great deal to admire about these scholarly communities. They embody deep reserves of insight and expertise, they have developed powerful methods for advancing and sharing knowledge, they facilitate sophisticated communication among scholars spread out in time as well as geography, they have developed very successful approaches to judging and affirming quality, and they are the most essential element in the continuing excellence of the finest system of higher education in the world. Of course, these communities of scholars are not perfect. They are too fragmented, sometimes they respond slowly to fresh challenges, and they do not communicate as productively as they might with those who are not scholars.

We should also recognize that these scholarly communities are fragile and delicate constructions. They will be significantly reshaped by the new electronic technology. How scholars gain access to intellectual resources, how they conduct scholarly research with one another, how they share preliminary results, and how they publish are being utterly and rapidly transformed. Scholarly communities must embrace the new technology because it provides the key to solving the most basic predicament of modern knowledge. It grows at such

an accelerating rate that the old technologies of physical libraries and print on paper can no longer be adequate.

But because they are fragile, scholarly communities may also be mauled or mangled by the transformation. There is opportunity, but there is also danger in the pace and bewildering frontiers of change. Finding workable and constructive approaches to handling intellectual property are absolutely critical to the adaptation of scholarly communities to the new technology. We need routines and understandings that work for hundreds of thousands of scholars who are both creators and users of new knowledge.

Higher Education

The U.S. has the best system of higher education in the world. It is both the highest quality system and the one which involves the highest percentage of citizens. It has become not only a major sector of the economy, but also a significant source of foreign exchange for the United States in educating large numbers of students from abroad.

For higher education there is also change and opportunity in electronic communication and publishing. The new electronic technology both supports and requires a population at ease in the world of networked information and cultural resources. In computers and networks there are rich possibilities for improving learning which we have only begun to explore. We have extraordinary new means for teachers and students to work together actively and collaboratively, and extraordinary new means for bringing text, sound, and image vividly into the classroom. Via distance learning there is tremendous promise for still improved access to education, and for education to be better integrated with other life activities.

At the same time, we need to appreciate that the financing of higher education is a wreck in progress. Tuition charges

have been rising at an alarming rate. Both federal and state governments have been withdrawing financial support. Costs have been pushed onto individual colleges and universities, and they, in turn, have passed the burden onto parents and students. Colleges and universities will be strapped to find the resources to acquire the available new technology and the new information resources.

A further irony is that the best strategies for making use of computers and networks are collaborative and national (even global), not individual and local. More than ever before, we need to work out collaborative strategies for institutions and individuals to share knowledge with one another. Virtual libraries and distributed information networks hold the best promise for the future. But the financial predicament could push us away from the technically best solutions.

Devising workable strategies for handling intellectual property will be critical for allowing higher education to take full advantage of the potential of the new technology. Colleges and universities expect to pay for intellectual property, but they need charges which are affordable and easy to administer, and which permit collaborative strategies and use of wide area networks.

Free Inquiry

We need an intellectual environment not just tolerant, but nurturing of creativity, exploration, analysis, criticism, and synthesis. This is not a separate context but a particularly vital and vulnerable aspect of all intellectual and creative contexts. The freest possible exchange of ideas has been and will continue to be essential to scholarship, the arts, entrepreneurship, and religious freedom. There is no question whether the new technology can support this. The development of the Internet, for example, has been

accompanied by a remarkable flowering of curiosity and creative endeavor.

We need to recognize, however, that while the new technology inclines towards free inquiry and expression, it does not guarantee either. Broadly speaking, I believe there are two dangers. One is a rising tide of intolerance, active antagonism to art and intellect, and willful ignorance. We have had episodes of anti-intellectualism in the past, and we appear to be currently in the midst of another. The rush to censor the Internet is just one small manifestation of its return. It will take much positive effort to reverse this trend.

The other danger would be in relying too heavily on profit-making activities and institutions in shaping the electronic future. The new technologies open many new doors to commercial exploitation of intellectual and creative works. We are in the midst of something akin to a land rush to stake claims to content that may have commercial value in the future. Publishers are finding new value in backlists, media conglomerates in old film libraries, and entrepreneurs in visual images of all kinds. As with all land rushes, however, there is risk that some things of value may be trampled along the way.

The marketplace and entrepreneurial activity certainly will have central places in the development of a national information infrastructure. But a sole focus on profitable undertakings is unlikely to serve well scholarly communities, higher education, or democracy. This is why the concept of fair use is well worth adapting to the new circumstances. Authors and publishers should be compensated for their work in most cases. No doubt we can work out technical and financial strategies which gain permission and pay royalties for most uses most of the time. But it would be chilling to have to ask permission for all uses of copyrighted materials. For a healthy climate of free inquiry, it will continue to be important *not* to

have to ask permission to quote and criticize or to parody a published work.

Let me simply name a broader and more formidable challenge. We need an environment in which all can be aware of what others *can* know. This does not mean everyone should have free access to everything that is published. Rather, it means that everyone should be able to be aware of what is available. For genuinely free inquiry we need a *common* intellectual realm: to publish is to make public. We achieved this in the print world via a complex array of institutions and practices: public education supporting widespread literacy, libraries, bookstores, daily newspapers, and more. What institutions and practices will we need to achieve this in a digital, networked environment? This is a problem that will take our most constructive joint efforts.

Conclusion

These three contexts I have been sketching — scholarly communities, higher education, and free inquiry — are not the only ones which we might consider. They are not the only ones which will matter in developing a national information infrastructure. They are certainly not the ones where the most money will be gained or lost. And there is no easy separation of these contexts from (for example) entertainment or the mass media. I have focused on these three because I believe they will require unusual and deliberate care in handling questions of intellectual property. The danger is that their special characteristics will be overwhelmed by developments in other realms. What will serve entertainment well is unlikely to serve scholarly communities, higher education, or free inquiry nearly as well.

Publishers, librarians, the educated public all rely on these specialized contexts. In working out approaches to fair use and

copyright in a networked age, we should take care not to press our positions — our rights — so narrowly or aggressively that we harm these realms. A thoughtful balance of rights and exemptions is the fundamental architecture of copyright law and practice. All three of these contexts require arrangements in which both producers of intellectual property and users of copyrighted materials are well served. Successful arrangements will bring rewards (financial and otherwise) to both producers and users. We all share an interest in negotiating agreements which support vigorous scholarly communities, a high quality, broadly accessible system of higher education, and the freest possible exploration of ideas and creative possibilities.

Douglas C. Bennett is Vice President of the American Council of Learned Societies.

"It would be helpful if research libraries would work in concert with scholarly societies to develop pricing schemes, to work out copyright issues, and to provide data on the impact of electronic provision in order to enhance associations' planning."

Copyright, Libraries, and the Financial Viability of Scholarly Society Journals

It seems that as we all face the electronic future, the scholarly societies, especially social science and humanities groups, have been conspicuously absent in the copyright debate as it applies to the electronic environment, even though such groups have a substantial stake in the outcome. When individual societies do take on the issue, they do so in meetings of the National Humanities Alliance or the American Council of Learned Societies.

What little such societies do know is through ARL's leadership in the National Humanities Alliance where Duane Webster has helped to create a committee on copyright and libraries. He has spoken to the Alliance on several occasions and continues to help members understand the issues.

There are reasons that scholarly societies have been so slow and relatively silent. First, most societies have extremely limited resources. Most scholarly associations are small or medium-sized groups with limited, overtaxed staffs. Some

have no full-time paid staff members at all. Few have ready access to legal counsel. Most do not have a technical computer person on staff. The scholarly organizations that do not reside on a university campus were on the whole slow to get on the Internet because until recently access for an entire office was costly and because the technical expertise was lacking.

The second reason that scholarly societies have not been vocal in the copyright in an electronic age conversation is that the challenges of the electronic future are paralyzing. Consider the dilemma in which these societies find themselves. They are charitable educational institutions that are committed to the free interchange of ideas and the production and use of scholarship. At the same time, to survive as organizations, these groups must generate an adequate stream of revenue. Typically, this revenue derives from individual and institutional dues. Individuals are willing to pay dues in part in order to receive the societies' journals. In addition, libraries pay even higher fees so that their patrons can have access to those journals. In the pre-electronic past, the fact that the library had a journal did not impede individuals on campus from subscribing to the same journal, probably because of the convenience, for example, of not having to trudge over to the library to search for a particular issue.

Imagine how the calculus changes if a faculty member can sit at her computer terminal at home and access the journal online through the campus library. Under this scenario a political scientist, for example, no longer needs her own copy of the *American Political Science Review*. Instead she can call it up and, even better, search it any time that she wants. As a result, because she does not need her own copy of the *Review*, she then has less reason to join the organization that publishes the journal. If many political scientists make that decision, the

American Political Science Association's survival may be threatened.

This is a collective action problem: Even if a scholar sees the value of the work of his society, he may be induced to ask, "Why should I join? My $75 does not make much difference in the aggregate, and I do not purchase anything special for my $75 that would not happen anyway." Without the journal, in other words, scholars may be disinclined to join.

Even before online access became such a looming possibility, societies found themselves under considerable financial pressure as libraries, themselves suffering stringent budget limits, cut back their subscriptions to societies' journals. With online access, however, the whole financial structure of societies implodes. Individuals will not need to join professional associations to get journals because their libraries will have them online and no physical barrier stands in the way of immediate access.

With both on-campus access and especially interlibrary loan, many fewer copies of a journal are needed. Theoretically, at some point only one copy of any journal will be needed, as everyone could access that copy electronically. *The* question is: Who pays for the copy? Can the price be sufficient to sustain the scholarly society?

Note the conflict that this whole issue, then, creates for associations. These groups' core values of facilitating scholarship and the free interchange of ideas collides with the very basis on which they have traditionally survived, that is, offering journals in exchange for membership dues. The societies' responses to the perilous future and to current financial challenges have been inadequate.

Most ominously, some groups have been making deals with for-profit publishers. Such publishers print scholarly journals, increasing the likelihood that the intellectual property will

be dominated by commerce, not scholarship. Such publishers do not necessarily share the values of the societies or, for that matter, of research libraries. Prices of journals are set to insure a healthy profit and increase the already heavy burden on libraries.

Happily, many societies have not joined up with for-profit publishers but are responding to financial challenges and the electronic future in a variety of promising ways.

They are developing online publications that are entirely new journals and thus not supplanting already existing print journals. Political science, for example, has a first-rate book review journal developed by Herb Jacob of Northwestern University in the law/courts field. It is freely available to all.

Societies are also revising their financial structures to a degree. The American Political Science Association, for instance, is edging toward more commercial activities in order to support scholarly activities, a practice commonly referred to as "cross-subsidization." By renting mailing labels, income can be generated for the work of the Committee on Professional Ethics, which is neither designed nor able to generate revenue to finance its activities. By aggressively selling exhibit booths at our annual meeting or space advertising in our journals, reliance on dues income can be relaxed and programs for minorities and graduate students, for example, can be sustained even as dues income declines.

Associations must, it seems to me, reduce their heavy reliance on dues income driven by journal subscriptions. At the same time, they must think of new ways of providing journals in an online environment and of paying for them.

Societies need the help of the research library community in this task. For instance, one future option is differential charging among institutions. Right now we charge a small, liberal arts college like Drury for a subscription to the

American Political Science Review at the same rate we charge Harvard University. Drury may use its subscription less than Harvard since Harvard's political science faculty is substantially larger and trains graduate students. How should we take such differences into account? This question becomes particularly critical as charges are developed for online access.

It would be helpful if research libraries would work in concert with scholarly societies to develop pricing schemes, to work out copyright issues, and to provide data on the impact of electronic provision in order to enhance associations' planning. Further, libraries would be doing a service to the entire scholarly enterprise to which they are committed — just as scholarly societies are — if libraries would work with such societies to stem indiscriminate loss of revenues by associations while at the same time increasing access to scholarly materials.

Robert Oakley, in his April 1994 address at the National Net meeting, points in the right direction. Associations and libraries together must think of ways to charge for materials that avoid transaction-based fees at the individual level. Such fees make good sense for profit-making businesses, but not for groups who value accessibility of knowledge and who are committed to the concept of a research library.

How can a charging regime be devised that controls costs to libraries and that does not penalize the scholarly societies producing the journals? Societies have to sit down with libraries and the two communities must work together. Even though they have different financial and budgetary imperatives, they share the same values and serve the same clientele. In absence of cooperation, commercial interests are likely to dominate. It is increasingly clear that national policy makers are inclined to let the market reign. Such a resolution to intellectual property issues is not in the interest of the

scholarly enterprise. The alternative is to create cooperative agreements between societies and libraries that will fulfill the needs of scholarly publishers, libraries, and users alike.

Catherine E. Rudder is Executive Director of the American Political Science Association.

"... both providers and users of information must cope in a world where they are no longer sure of the rules, and since the providers of information are first and foremost businesses, their reaction has been to cover any potential lapses in the old legal framework of copyright law, by the next best thing — a strong dose of contract law."

Coping with Copyright and Beyond: New Challenges as the Library Goes Digital

Today, with the explosion of electronic-based delivery system technology, except for books and journals purchased in printed, hard copy form, virtually all knowledge and information our educational institutions and libraries wish to acquire for student and faculty research use or that our libraries wish to add to their physical collections ... comes neatly tied up in a legal document. Universities, presently, simply cannot acquire electronically delivered knowledge without first agreeing to legal terms and conditions that are structured by the seller of knowledge for one purpose, and one purpose only, to get the greatest possible financial return, from the greatest number of information consumers without risk of losing control over the revenue-producing asset. It may be crass but the packaging and delivery of information is big business today — a growth industry that moves far beyond traditional publishing.

Consequently, as the library, a public service provider, embraces new technologies to remain a relevant resource for

Americans who seek to acquire and expand their intellectual capacities, it collides head-on with American entrepreneurialism in search of profit margin. Corporate America (and corporate Europe for that matter) is focused on maximizing profits and maintaining a competitive edge for its knowledge-based products.

No one condemns the commercial knowledge provider for doing what comes naturally in this country — seeking to make a successful business — and doing it better, quicker, and smarter, because the public generally benefits from this kind of activity. In reaching for the brass ring however, an existing balance of interests between the providers of knowledge and the users of knowledge is being tipped, by using legal agreements, in favor of the providers.

To get a clearer sense of what is really happening out there, we might look at how three information-related innovations are changing the way the library has to do business and in doing so is tipping those scales away from the careful balance that the 1976 Copyright Act achieves:

— Electronic Delivery Systems including journals, multi-media works, books, computer programs;
— Database Collections including maps, images, raw data, genetic materials, anything under the sun, coming to you via a friendly CD-ROM or by online access; and
— Real-time Online Access Services including dynamic information products such as daily news feeds and daily stock-market statistics, static collections of information such as encyclopedias residing on a server controlled, not by the library, but actually at the vendor's site.

Before the digital revolution, libraries acquired journals, books, collections, daily newspapers, trade press, etc. in

print/paper format or on film and knew fairly well where they stood with respect to permitted uses of these materials — squarely in the Copyright Comfort Zone. There were, of course, occasional disagreements between copyright holders and libraries associated with fair use and interlibrary loan, but for the most part libraries were confident about how to conduct their business.

When we ask what's different in the world of digitized information, the answer is, in a word — everything. Publishers and copyright holders who, like the libraries, were comfortable in a world of print, now find themselves in a world of instant mass dissemination. Information is now capable of flowing through electronic and fiber-optic networks for simultaneous delivery to millions of sites, via systems that allow the information to be copied into print or electronic format with the stroke of a key. Information work products can be added to or diminished on a computer screen, stored for later retrieval in files that can be rearranged or otherwise manipulated, all without the touch of a human hand.

So, both providers and users of information must cope in a world where they are no longer sure of the rules, and since the providers of information are first and foremost businesses, their reaction has been to cover any potential lapses in the old legal framework of copyright law, by the next best thing — a strong dose of contract law.

Electronic Delivery Systems

In this new environment the publisher is now unsure as to whether the basic elements of copyright law will adequately protect the material that is delivered to the library electronically. The publisher should perhaps not be too harshly judged when reaching the conclusion that because the method of delivering the material has changed and is now

computer-based, a new form of agreement, one that not only establishes fees, but also is useful in adding new rules to the game, is needed.

For instance, the publisher is not sure that an electronic copy sent from one library to another under the interlibrary loan guidelines or the copyright statute will be protected from all sorts of scurrilous misdeeds by libraries. Therefore, the subscription agreement may include a restriction on making copies and may prohibit electronic copying. As a result, despite the possibilities ushered in by the new electronic technology, interlibrary loan may continue only via paper and perhaps via the fax machine, if anything.

Some publishers are already making changes in the publisher/user relationship through the contract, fair use, always a burr under the saddle, has become another target. Some publishers are seeking to get rid of it, through a subscription agreement wherein the library agrees to make only such use of the journal as specifically permitted in the contract and will make no other uses. It's no longer a matter of copyright law but having a contract between consenting, if not equal, parties. And the law is thoroughly supportive of contract terms!

In the following table we see how the delivery and use of materials can begin to change based on the medium. Whereas in the print medium, access and use, distribution and duplication, is governed by the Copyright Act — in the electronic medium these issues are dependent upon the technology available to the library and upon the terms of a legal agreement.

DELIVERY SYSTEMS

Delivery Access/Use	Print Media – Dependent Upon Copyright Act	Electronic Media – Dependent Upon License and Technology
Availability to Patron	Purchased, Copy On Shelves	Dedicated Computer – Server
Making a Copy	Photocopier	Synergy of Technology/May Not Be Possible
Redistribution	ILL, Fair Use	No Copies Distributed Outside University
Users	Anyone	Authorized Users, i.e., Faculty, Students, Staff
Storage	Library Shelves, Microfilm	Bit storage? Technology? Storage Site?
Subscription Price	Uniform	Varies/Concurrent Use Fee/Pay Per Look

Database Collections

Database Collections present a very interesting turn of events for the digital library that wants to provide anthologies or collections of information previously available in print, but now residing on a CD-ROM or by online access. In fact, because collections are residing on a CD-ROM, we have access to more information than ever before so of course we want to be able to use this new wondrous technology. We are all comfortable with the copyright rules governing permitted and prohibited uses of collected information, but, unfortunately, before we can get our new database to install in the reference room, we are asked to sign a license agreement that permits the database provider to place even greater restrictions and conditions on use of the product.

For example, we are seeing, more often than not, the database provider seizing the opportunity to place trade secret protection on the data contained in the database. The fact that the data is often public domain information, or data not actually owned by the database publisher, seems to be irrelevant as non-disclosure requirements are placed in the license agreement.

Adding trade secret protection is generally not the end of the database owner's conditions with which users will be expected to comply. We also see requirements to submit for review research papers using any data or to provide papers for unlimited use by the database publisher. Even worse, we see total prohibitions against publishing or making a commercial use of the collected database information. Publication restrictions can go so far as to prohibit publishing research findings that use the collected data, and may prohibit publishing or disclosing the data itself, even though that data may be in the public domain. In the case of one database owned and controlled by a pharmaceutical company, a right was

added to the agreement allowing the company to practice inventions made during research projects that utilized the database.

By allowing these kinds of requirements to be included in licenses, we are straying far from the concept of copyright which, remember, historically protects the copyright holder from unauthorized uses related to expression and nothing else.

In addition to all of the license restrictions typically used for electronic delivery systems, additional restrictions for database collections raise a series of new issues. The following questions should be asked before signing a license:

- What are the non-disclosure obligations for data and can the library enforce them?
- What are the use restrictions – academic v. commercial – and can these be policed?
- Must copies of research papers be sent to the publisher?
- Do users have to seek permission for publication of papers?
- Does the license control rights and/or ownership of inventions made using the data?

Online Access Systems

To introduce issues associated with online access systems, we begin with a quote from the Britannica Online Agreement: "All usage of Britannica Online is governed by the terms of the Encyclopædia Britannica's [EB] Software Licensing Contract, to be signed in advance of access, which sets forth the terms, conditions, and limitations of use." That message from EB sends

a very strong signal that we can expect to have more to deal with than just matters of copyright law!

Perhaps a quick run-through of MIT's difficulties with the Encyclopædia Britannica license, as it was first structured, will provide an idea of what educational and research institutions are up against and why it took a team of lawyers, librarians, and computer systems people at MIT to reach a mutually acceptable arrangement with EB.

- The definition of "authorized users" was too limited to serve the MIT community. It took many discussions just to arrive at an acceptable definition of "part time students."

- Copying was restricted except as permitted under "applicable law" — perhaps a benign admission that U.S. copyright law, including fair use, applied but initially not at all clear.

- MIT had to agree that it would not provide access to third parties, meanwhile the database itself sits on an EB server, not an MIT server — that meant MIT did not control access, EB did.

- In addition, we were prohibited from allowing access by unauthorized users, but it was not within MIT's control to keep them out because of our layered and hopefully seamless computing environment. Without the aid of our computer systems people, MIT would not have been able to structure an agreement with EB that would have worked. Certainly, EB was in no position to know whether the terms of its license would be consistent with the parameters of MIT's competing environment.

- There was an automatic termination of the license if MIT breached the terms of the license. EB would turn off MIT's access — an interesting concept for a library. We went through extensive negotiations to prevent a campus-wide turn-off for a single breaching event by a wayward student.

- In addition, there were all of the other indemnity obligations, disclaimers of liability, etc. on the part of EB — all of those things that strike terror in the hearts of lawyers at educational institutions.

When contemplating procuring online access systems you will be faced with the same restrictions that apply to electronic delivery systems and database collections and perhaps even more. The issues to be aware of are:

- Fee structures based on the size of the community served; not based on actual usage of the system.

- Student access may or may not be permitted. Consider the case of the New York Stock Exchange online access agreement which initially did not allow student access.

- Some providers impose prohibitions against copying for any purpose, regardless of fair use.

- Frequently there is a clause restricting disclosure of data despite the fact it's publicly available.

I hope these examples bring home the push-pull of the digital revolution for the library. On the one hand, the speed, convenience, and sheer volume of information made accessible by digital technology and delivery is a boon. On the other

hand, market factors and the business enterprise are bringing digital information to the libraries at a substantial cost, not just in dollars. We are routinely accepting many more limitations on our use of information than we did in the era of print.

I'll leave you with a final thought to ponder: How does the academic community, most particularly the libraries, regain and maintain the balance of interests between the providers of knowledge and the users of knowledge? More accurately, are we really talking about regaining an old balance, or should we be considering a new one that will work for both the knowledge provider and the knowledge user of the future?

Karen Hersey is the Intellectual Property Counsel for the Massachusetts Institute of Technology.

"All three branches of the U.S. government are addressing the complex fair use issue. Faculty members, librarians, and scholarly publishers must unite to give fair use comparable attention and direction, because they are the key parties who must adjust their habits and conform to the outcomes."

Copyright Challenges for Libraries and Higher Education: The NII and the Texaco Decisions

In many ways copyright is a paradoxical issue, because we need to consider and evaluate our source of information at the same time that we rely on experts. Even among a friendly group of library representatives, if you asked a copyright question you might get a different answer from each.

The uncertainty of copyright in an electronic environment is a major issue underlying developments with the National Information Infrastructure (NII). The Working Group on Intellectual Property Rights of the National Information Infrastructure Task Force[1] has focused on this issue since the fall

[1] The Working Group on Intellectual Property Rights was established as part of the Clinton Administration's National Information Infrastructure Task Force. It has led discussions about the copyright law and its application in the National Information Infrastructure (NII). In July 1994, the Working Group issued a draft report *Intellectual Property and the National Information Infrastructure*, known as the Green Paper. The Green Paper received many comments since its release and a final White Paper is expected to be issued in the summer of 1995.

of 1993 and is expected to issue a White Paper soon with proposals for reform of the Copyright Act. The proposals in the White Paper are yet unknown but they may include at least two issues that are important to our community: restrictions on the first sale doctrine, or the ability to lend or sell a work that you have lawfully acquired; and restrictions on transmissions of a work in electronic form. In addition, the White Paper is expected to address guidelines for fair use of copyrighted materials in an electronic environment that have been the subject of the Conference on Fair Use, a series of meetings being held in Washington, DC. The White Paper will not include the text of many guidelines, if any, simply because there is no way that the meetings, comprising many different people with many different perspectives, will come to any kind of agreement on guidelines in the time frame allowed. The issues are far too complex.

The issuance of the White Paper will also open the doors to other proposals for legislative reform of the Copyright Act. One section of the Copyright Act under scrutiny by several groups is Section 108 on library copying. From the point of view of libraries and library users, the expected proposals for revisions of the Copyright Act are good news and bad news. Some proposals may address preservation issues and open up more possibilities for digital preservation.

On the troublesome side is open talk, especially from publisher groups, about doing away with the interlibrary loan provision of Section 108, which clearly secures the right to share limited photocopies for purposes of interlibrary loans. In the view of some publishing officials, interlibrary loan should exist only in highly constrained forms, and the *rule-of-five* limitation that we have lived with for quite some years now

could be eliminated.[2] Other proposals may limit interlibrary loan to low technologies. For example, mailing a photocopy may be acceptable, but do not dare elevate the technology beyond the photocopy machine — no faxes, no electronic transmittal, nothing else. These are serious battles that we must be prepared to fight.

In addition to the activity of the Working Group and possible legislative reforms, we face another development that cannot be emphasized enough: the Texaco case.[3] In 1985 a group of publishers sued Texaco Inc. for copyright infringement. At issue was whether a scientist at Texaco acted within fair use when he made isolated, single copies of journal articles for his own research needs. In May of this year the case was reported settled out of court, as Texaco was preparing the case for appeal to the U.S. Supreme Court. A settlement at this stage is the worst possible result, because it leaves on the record two adverse decisions — one from the District Court and one from the Second Circuit Court of Appeals — as the authority that will be leaned upon for guidance about what may be photocopied under certain circumstances. Both lower courts ruled that the copying in the Texaco case was not fair use. Worse than the actual decision is the reasoning that the courts used to reach that conclusion. Although the case does not apply to photocopying done in non-profit educational institutions for educational purposes, it does offer some significant insights for

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[2] Guidelines put in place after the 1976 Copyright Act was enacted clarify that libraries are well within the spirit and letter of the law when a requesting library requests up to five photocopies of articles from any single journal title during a single calendar year, not including articles more than five years old. These guidelines are familiar to many librarians as the "CONTU Guidelines."

[3] American Geophysical Union, et al. v. Texaco Inc., 802 F.Supp. 1 (S.D.N.Y. 1992), aff'd 37 F3d 881 (2d Cir. 1994).

educational and research institutions. While we can distinguish the circumstances of this case from situations in libraries or in educational and research institutions, the courts' reasoning is powerful and innovative.

In order to understand the courts' reasoning, we must return to the four factors of analysis that Congress directed us to evaluate in any fair use decision: purpose, nature, amount, and effect. (Figure 1)

In summary, the analysis of the courts in the Texaco decision was as follows:

Purpose: The purpose factor examines the purpose for which you are copying the protected work. The Texaco case tells us that, in the context of photocopying for research by the Texaco scientists, the purpose had several traits supporting the claims of infringement. The 1992 District Court decision held that although the copying was for research, which is generally a favored purpose, the purpose was commercial, because the research was ultimately to strengthen the company. On review, the Second Circuit Court of Appeals concurred that consideration of the first factor in the Texaco case supported the publishers' claims, but for different reasons. The appeals court found that the for-profit character of the company, while relevant, had been over emphasized. Instead, the appeals court focused on the *use* of the copied articles rather that the *user*, and defined the purpose of the use as "archival." The Texaco scientist, by taking the copies and putting them in a file for undetermined future research, was "archiving." According to the court, he was in effect building a library in his file drawer that potentially competed with purchasing originals from the publisher.

Section 107 of the Copyright Act of 1976.
Limitations on exclusive rights: Fair use.

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phono-records or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Figure 1

In addition, both courts found that the photocopies were not "transformative" because copies that merely reproduce the originals do not "transform" them into a new work or one with a new utility. In 1994 the U.S. Supreme Court explored this "transformative" concept when it examined the fair use of a rap parody of Roy Orbison's "Oh, Pretty Woman" song.[4] The Campbell case offers many valuable insights into copyright that allow us to distinguish library and higher education activities from the Texaco case. The Campbell case rejected the presumption that commercial uses would not be a fair use, even though the Supreme Court had perpetrated that statement in the first place. The Supreme Court also made clear in a most important footnote in the Campbell case, and one that we should be heralding wherever possible, that the transformative concept may not be necessary in the educational setting. The Court pointed to the language of the fair use statute itself, which specifically allows multiple copies for teaching purposes: "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching *(including multiple copies for classroom use)*, scholarship, or research, is not an infringement of copyright (emphasis added)." This is powerful language from the Supreme Court, and it reveals that the Supreme Court might have been likely to isolate even further the commercial facts of the Texaco case from academic needs, if not reverse the lower courts entirely.

Nature: According to the Texaco rulings, this factor leans in favor of fair use, because the works used were factual in nature. Both courts distinguished factual, scientific articles from fiction; courts generally allow greater fair use of factual works.

Amount: This factor presents a challenge because the Texaco decisions defined the articles as independent works.

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[4] Campbell v. Acuff-Rose Music, Inc., 114 S.Ct. 1164 (1994).

According to the Texaco decisions, copying an article is copying the entire work, and not a portion of the longer journal issue. Seldom do courts find in favor of fair use when the entire work is reproduced.

Effect: The fourth factor explores the effect of the use on the market for the original work. This is perhaps the most nebulous factor, and under the Texaco decisions it is the single most troublesome fair use issue. The lower courts conceded that they found little evidence of lost subscriptions resulting from the photocopying by the Texaco scientist. However, the courts did conclude that the copying resulted in a loss of payment to the Copyright Clearance Center (CCC).

The CCC holds tremendous promise and can provide an enormously valuable service in securing permissions needed for copying that goes *beyond* fair use. However, the CCC has no business in this fair use analysis. Not only is this analysis from the lower courts dangerous; it is flat out wrong. Our duty under the law is to analyze if a use of copyrighted material is a fair use. If it exceeds fair use, we may then choose to make the royalty payments to the CCC as a means for obtaining permission. In the Texaco decision, the courts reversed this process and examined the availability of the CCC first to determine what might be fair use.

In fact, the Campbell case from the Supreme Court tells us that we need to be concerned only about the effect on those markets that the copyright owner is likely to exploit. We can at least identify those copyright owners and publishers that are actually using the CCC (or other means of collecting royalties) and distinguish them from those that do not.

This paper presents only brief summaries of two of the many copyright developments that could have profound consequences for libraries, higher education, and research. ARL

and other library and academic organizations have become important participants, wherever possible, in attempting to shape the decisions of the courts, of Congress, and of other governmental agencies. These organizations also work to keep their constituencies informed about the developments. All three branches of the U.S. government are addressing the complex fair use issue. Faculty members, librarians, and scholarly publishers must unite to give fair use comparable attention and direction, because they are the key parties who must adjust their habits and conform to the outcomes.

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Appendix 1

American Geophysical Union, et al. v. Texaco Inc.

On May 16, 1995, Texaco Inc. announced a settlement of a long-standing copyright infringement suit brought in 1985 by six publishers against Texaco. Individual scientists had photocopied articles from scientific journals, to which Texaco subscribed, and had not paid royalties to the publishers for the copying. The suit was decided by a federal district court in 1992, holding that companies in the for-profit sector which make copies of copyrighted scientific and technical journal articles violate fair use under the Copyright Act of 1976. Unfortunately for researchers and libraries, the settlement means that the fair use issues raised by the case will not be resolved by the U.S. Supreme Court.

A coalition of library and academic associations filed a friend of the court brief in support of Texaco in its appeal to the U.S. Court of Appeals for the Second Circuit. On October 28, 1994, the Second Circuit handed down its decision in American Geophysical Union v. Texaco, 37 F.3d 882 (2d Cir. 1994), affirming the lower court's holding rejecting Texaco's claim of fair use, but setting forth different reasons.

On April 24, 1995, Texaco filed its petition before the U.S. Supreme Court, and the library and academic associations planned to petition the court to allow them to file a friend of the court brief in support of Texaco. Before this could occur, Texaco entered into settlement discussions with the publishers and agreed to pay "slightly more than $1 million, plus a retroactive licensing fee to the Copyright Clearance Center. Texaco will also sign a five-year licensing agreement with the center." Texaco asked the courts to delay further action pending

the approval of the group of 83 publishers, now a party to the suit. The court must approve the settlement.

Without a ruling by the U.S. Supreme Court, users of copyrighted materials are left with the unfortunate reasoning of the Second Circuit on the first fair use factor, the purpose and character of the use. It is probable and unfortunate that the holding of the Texaco case will become a model for other circuits facing similar questions.

The broad issue of whether making a single copy of scientific journal articles for personal use and archiving is considered fair use was not before the Second Circuit. Instead, the issue before the court was whether the copying of the eight articles at issue under the specific facts of this case was fair use.

In its fair use analysis the court held that:

- The for-profit motive of the company is still a relevant consideration in the analysis of the purpose of the use, although the court recognized that the focus should be on the use of the material and not on the user. The predominant "archival purpose" (the copied articles were placed in the scientist's files for use as needed and thus were non-transformative) tipped the scales against fair use.
- On the second factor, the nature of the work, the court found for Texaco because the articles were primarily scientific.
- In determining the third factor, the amount of the work copied, the court noted that the entire article was copied rather than focusing on an article as a portion of a volume of the journal and, thus, found against Texaco on this factor.
- Finally, the court found that the publisher had not lost subscriptions, but had lost the right to license the work for reproduction. Because of the existence of the Copyright

Clearance Center (CCC), Texaco could have acquired a license; therefore, the market was affected.

The dissent noted that the researcher's purpose of science is one of the enumerated categories listed in the preamble to Section 107 of the Copyright Act of 1976. The dissent concluded that the existence of the CCC is an irrelevant consideration in determining whether a given use is fair and is an unworkable method of obtaining and paying for authorization to copy. The CCC does not represent all publishers nor is it able to authorize copying for all publications of all publishers.

The court left many issues unresolved, for example:

- The court failed to differentiate between a direct commercial use and an indirect relation to a commercial activity.
- The court failed to specify whether it saw any difference for researchers funded on grants from government agencies and those funded by grants from commercial companies.
- The court failed to discern a difference between government research laboratories (nonprofit) which are encouraged to develop public/private partnerships and scientists in the for-profit sector.
- The court failed to provide guidance on copying to the general public by state supported institutions when that copying might be used to enhance profit for an individual or a business.
- The court failed to recognize a difference between copying in health sciences libraries or medical schools which serve a combination of doctors in the commercial sector and residents in the educational sector.

The case does not apply to the following:

- copying done in nonprofit educational institutions for educational purposes; and
- copying done by libraries and archives under section 108 of the Copyright Act of 1976.

For-profit institutions directly affected should think about how they wish to handle licenses for copying that exceeds fair use. Permission to copy may be obtained directly from publishers, document delivery services whose fees include royalty payments may provide another avenue for paying royalties, or organizations may choose to join the CCC and other licensing agencies.

Sarah K. Wiant is Director of the Law Library at Washington and Lee University.

Appendix 2

Intellectual Property: An Association of Research Libraries Statement of Principles

"The primary objective of copyright is not to reward the labour of authors, but [t]o promote the Progress of Science and useful Arts. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."

— Justice Sandra Day O'Connor

Affirming the Rights and Responsibilities of the Research Library Community in the Area of Copyright

The genius of United States copyright law is that it balances the intellectual property rights of authors, publishers and copyright owners with society's need for the free exchange of ideas. Taken together, fair use and other public rights to utilize copyrighted works, as established in the Copyright Act of 1976, constitute indispensable legal doctrines for promoting the dissemination of knowledge, while ensuring authors, publishers and copyright owners protection of their creative works and economic investments. The preservation and continuation of these balanced rights in an electronic environment are essential to the free flow of information and to the development of an information infrastructure that serves the public interest.

The U.S. and Canada have adopted very different approaches to intellectual property and copyright issues. For example, the Canadian Copyright Act does not contain the

special considerations for library and educational use found in the U.S. Copyright Act of 1976, nor does it place federal or provincial government works in the public domain. Because of these differences, this statement addresses these issues from the U.S. perspective.

Each year, millions of researchers, students, and members of the public benefit from access to library collections — access that is supported by fair use, the right of libraries to reproduce materials under certain circumstances, and other related provisions of the copyright law. These provisions are limitations on the rights of copyright owners. The loss of these provisions in the emerging information infrastructure would greatly harm scholarship, teaching, and the operations of a free society. Fair use, the library and other relevant provisions must be preserved so that copyright ownership does not become an absolute monopoly over the distribution of and access to copyrighted information. In an electronic environment, this could mean that information resources are accessible only to those who are able to pay. The public information systems that libraries have developed would be replaced by commercial information vendors. In the age of information, a diminished scope of public rights would lead to an increasingly polarized society of information haves and have-nots.

Librarians and educators have every reason to encourage full and good-faith copyright compliance. Technological advancement has made copyright infringement easier to accomplish, but no less illegal. Authors, publishers, copyright owners, and librarians are integral parts of the system of scholarly communication and publishers, authors, and copyright owners are the natural partners of education and research. The continuation of fair use, the library and other relevant provisions of the Copyright Act of 1976 applied in an electronic environment offer the prospect of better library

services, better teaching, and better research, without impairing the market for copyrighted materials.

Although the emerging information infrastructure is raising awareness of technological changes that pose challenges to copyright systems, the potential impact of technology was anticipated by the passage of the Copyright Act of 1976. Congress expressly intended that the revised copyright law would apply to all types of media. With few exceptions, the protections and provisions of the copyright statute are as relevant and applicable to an electronic environment as they are to a print and broadcast environment.

The research library community believes that the development of an information infrastructure does not require a major revision of copyright law at this time. In general, the stakeholders affected by intellectual property law continue to be well served by the existing copyright statute. Just as was intended, the law's flexibility with regard to dissemination media fosters change and experimentation in educational and research communication. Some specific legislative changes may be needed to ensure that libraries are able to utilize the latest technology to provide continued and effective access to information and to preserve knowledge.

The Association of Research Libraries affirms the following intellectual property principles as they apply to librarians, teachers, researchers, and other information mediators and consumers. We join our national leaders in the determination to develop a policy framework for the emerging information infrastructure that strengthens the Constitutional purpose of copyright law to advance science and the useful arts.

Statement of Principles

1: Copyright exists for the public good.

The United States copyright law is founded on a Constitutional provision intended to "promote the progress of Science and Useful Arts." The fundamental purpose of copyright is to serve the public interest by encouraging the advancement of knowledge through a system of exclusive but limited rights for authors and copyright owners. Fair use and other public rights to utilize copyrighted works, specifically and intentionally included in the 1976 revision of the law, provide the essential balance between the rights of authors, publishers and copyright owners, and society's interest in the free exchange of ideas.

2: Fair use, the library, and other relevant provisions of the Copyright Act of 1976 must be preserved in the development of the emerging information infrastructure.

Fair use and other relevant provisions are the essential means by which teachers teach, students learn, and researchers advance knowledge. The Copyright Act of 1976 defines intellectual property principles in a way that is independent of the form of publication or distribution. These provisions apply to all formats and are essential to modern library and information services.

3: As trustees of the rapidly growing record of human knowledge, libraries and archives must have full use of technology in order to preserve our heritage of scholarship and research.

Digital works of enduring value need to be preserved just as printed works have long been preserved by research libraries. Archival responsibilities have traditionally been undertaken by libraries because publishers and database producers have generally preserved particular knowledge only as long as it has economic value in the marketplace. As with other formats, the preservation of electronic information will be the responsibility of libraries and they will continue to perform this important societal role.

The policy framework of the emerging information infrastructure must provide for the archiving of electronic materials by research libraries to maintain permanent collections and environments for public access. Accomplishing this goal will require strengthening the library provisions of the copyright law to allow preservation activities which use electronic or other appropriate technologies as they emerge.

4: Licensing agreements should not be allowed to abrogate the fair use and library provisions authorized in the copyright statute.

Licenses may define the rights and privileges of the contracting parties differently than those defined by the Copyright Act of 1976. But licenses and contracts should not negate fair use and the public right to utilize copyrighted works. The research library community recognizes that there will be a variety of payment methods for the purchase of copyrighted materials in electronic formats, just as there are differing contractual agreements for acquiring printed information. The research library community is committed to working with publishers and database producers to develop model agreements that deploy licenses that do not contract around fair use or other copyright provisions.

5: Librarians and educators have an obligation to educate information users about their rights and responsibilities under intellectual property law.

Institutions of learning must continue to employ policies and procedures that encourage copyright compliance. For example, the Copyright Act of 1976 required the posting of copyright notices on photocopy equipment. This practice should be updated to other technologies which permit the duplication of copyrighted works.

6: Copyright should not be applied to U.S. government information.

The Copyright Act of 1976 prohibits copyright of U.S. government works. Only under selected circumstances has Congress granted limited exceptions to this policy. The Copyright Act of 1976 is one of several laws that support a fundamental principle of democratic government — that the open exchange of public information is essential to the functioning of a free and open society. U.S. government information should remain in the public domain free of copyright or copyright-like restrictions.

7: The information infrastructure must permit authors to be compensated for the success of their creative works, and copyright owners must have an opportunity for a fair return on their investment.

The research library community affirms that the distribution of copyrighted information which exceeds fair use and the enumerated limitations of the law require the

permission of and/or compensation to authors, publishers and copyright owners. The continuation of library provisions and fair use in an electronic environment has far greater potential to promote the sale of copyrighted materials than to substitute for purchase. There is every reason to believe that the increasing demand for and use of copyrighted works fostered by new information technologies will result in the equivalent or even greater compensation for authors, publishers and copyright owners. The information infrastructure however, must be based on an underlying ethos of abundance rather than scarcity. With such an approach, authors, copyright owners, and publishers will have a full range of new opportunities in an electronic information environment and libraries will be able to perform their roles as partners in promoting science and the useful arts.

Adopted by the ARL Membership May 1994

Appendix 3

Introduction

The following statement, "Fair Use in the Electronic Age: Serving the Public Interest," is an outgrowth of discussions among a number of library associations regarding intellectual property, and in particular, the concern that the interests and rights of copyright owners and users remain balanced in the digital environment.

The purpose of the document is to outline the lawful uses of copyrighted works by individuals, libraries, and educational institutions in the electronic environment. It is intended to inform ongoing copyright discussions and serve as a reference document for users and librarians. It is our goal that this Working Document be circulated widely and spark discussions on these issues. Thus the statement will continue to be a work in progress. We continue to welcome feedback on the statement.

This statement was developed by representatives of the following associations: American Association of Law Libraries, American Library Association, Association of Academic Health Sciences Library Directors, Association of Research Libraries, Medical Library Association Special Libraries Association

Working Document 1/18/95

Fair Use in the Electronic Age: Serving the Public Interest

The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is

neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

— Justice Sandra Day O'Connor (Feist Publications, Inc. v. Rural Telephone Service Co., 499 US 340,349 (1991)

The genius of United States copyright law is that, in conformance with its constitutional foundation, it balances the intellectual property interests of authors, publishers and copyright owners with society's need for the free exchange of ideas. Taken together, fair use and other public rights to utilize copyrighted works, as confirmed in the Copyright Act of 1976, constitute indispensable legal doctrines for promoting the dissemination of knowledge, while ensuring authors, publishers and copyright owners appropriate protection of their creative works and economic investments.

The fair use provision of the Copyright Act allows reproduction and other uses of copyrighted works under certain conditions for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research. Additional provisions of the law allow uses specifically permitted by Congress to further educational and library activities. The preservation and continuation of these balanced rights in an electronic environment as well as in traditional formats are essential to the free flow of information and to the development of an information infrastructure that serves the public interest.

It follows that the benefits of the new technologies should flow to the public as well as to copyright proprietors. As more information becomes available only in electronic formats, the public's legitimate right to use copyrighted material must be protected. In order for copyright to truly serve its purpose of "promoting progress," the public's right of fair use must continue

in the electronic era, and these lawful uses of copyrighted works must be allowed without individual transaction fees.

Without infringing copyright, the public has a right to expect:

- to read, listen to, or view publicly marketed copyrighted material privately, on site or remotely;
- to browse through publicly marketed copyrighted material;
- to experiment with variations of copyrighted material for fair use purposes, while preserving the integrity of the original;
- to make or have made for them a first generation copy for personal use of an article or other small part of a publicly marketed copyrighted work or a work in a library's collection for such purpose as study, scholarship, or research; and
- to make transitory copies if ephemeral or incidental to a lawful use and if retained only temporarily.

Without infringing copyright, nonprofit libraries and other Section 108 libraries, on behalf of their clientele, should be able:

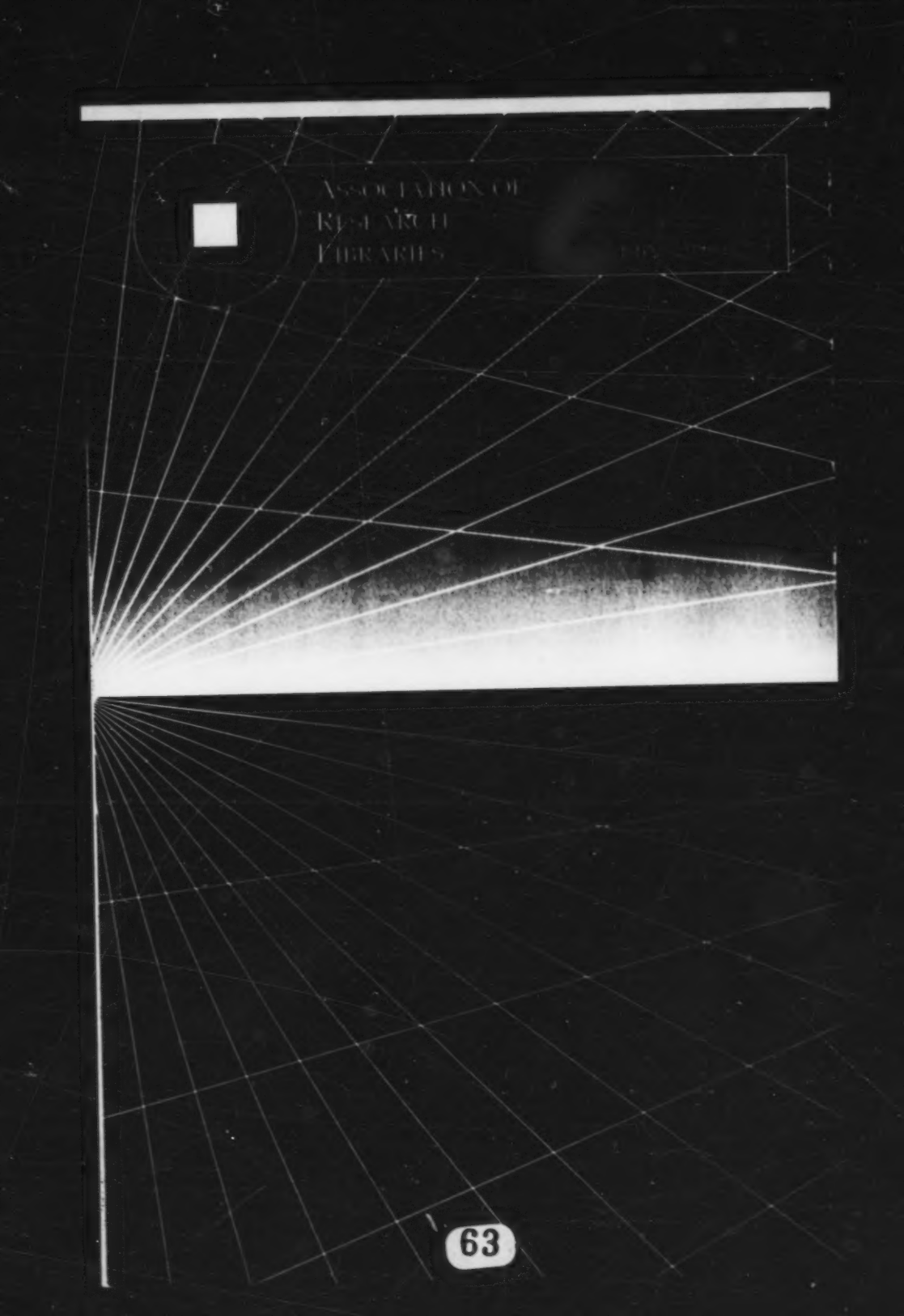
- to use electronic technologies to preserve copyrighted materials in their collections;
- to provide copyrighted materials as part of electronic reserve room service;
- to provide copyrighted materials as part of electronic interlibrary loan service; and
- to avoid liability, after posting appropriate copyright notices, for the unsupervised actions of their users.

Users, libraries, and educational institutions have a right to expect:

- that the terms of licenses will not restrict fair use or other lawful library or educational uses;
- that U.S. government works and other public domain materials will be readily available without restrictions and at a government price not exceeding the marginal cost of dissemination; and
- that rights of use for nonprofit education apply in face-to- face teaching and in transmittal or broadcast to remote locations where educational institutions of the future must increasingly reach their students.

Carefully constructed copyright guidelines and practices have emerged for the print environment to ensure that there is a balance between the rights of users and those of authors, publishers, and copyright owners. New understandings, developed by all stakeholders, will help to ensure that this balance is retained in a rapidly changing electronic environment. This working statement addresses lawful uses of copyrighted works in both the print and electronic environments.

These documents and other copyright related materials are available on the ARL server (http://arl.cni.org/scomm/copyright/copyright.html) and gopher (arl.cni.org).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